Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CAROL MAJESKE, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are white Chicago Police officers, many of them white females, who were among 600 white officers that the City of Chicago ("the City") blocked from taking the second component of the 1989 detective promotion test, an oral board, based upon racial quotas on the first component, a multiple choice test.

I. On a police promotion test, may the City set racial quotas on the first component, to give preferences to blacks, Hispanics, and American Indians, over higher-scoring white females, particularly when all females were the victims of the City's past intentional discrimination based on their sex and were severely underrepresented in the rank at issue?

II. May a court find that the City had a compelling governmental interest for the quotas, when the jury rejected the City's only attempt to show a compelling governmental interest, namely, its attempt to show that unfavorable treatment or hostility caused exclusion of blacks and Hispanics from the detective rank?

III. When the trial court refused petitioners' proposed jury questions asking whether past discrimination led to underrepresentation of black and Hispanic detectives, did the court wrongly make a finding on that issue?

IV. Were quotas narrowly tailored, where the jury determined that the City failed to explore race-neutral alternatives, and where the uncontested facts show random inclusion of Hispanics and American Indians in the quotas, and show undue trammelling on whites?

PARTIES TO THE PROCEEDINGS

The petitioners are listed in the Appendix (A-66).

The respondents are the City of Chicago, Leroy Martin, Charles Ford, Edward Brooks, Hubert Holton, Glenn Carr, Richard M. Daley, Gerald Cooper, Kelly R. Welsh, Susan Sher, Lawrence Rosenthal, Sarah Vanderwicken.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reprinted in the Appendix and is reported at 218 F.3d 816. (A-1) By order of September 1, 2000, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc. (A-65)

The Seventh Circuit had affirmed the opinion of the United States District Court Judge George Lindberg, which is not reported. The final opinions and orders are reprinted in the Appendix. (A-35 to 61)

JURISDICTION

On July 10, 2000, the Court of Appeals for the Seventh Circuit entered the judgment sought to be reviewed. On September 1, 2000, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc. This Court has jurisdiction under 28 U.S.C Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Const. Amend. XIV, sec. I:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Sec. 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In Count I of their complaint, petitioners sued the City of Chicago ("the City") under 42 U.S.C. § 1983, the enforcement statute for the Equal Protection Clause of the United States Constitution.

A. Race-based cutoff scores on the multiple choice component of the 1989 detective test

The 83 white petitioners, many of them white females, challenge racial quotas on the multiple choice component of the 1989 Chicago Police Department (CPD) detective test. Due to the quotas on the first component, a multiple choice test, petitioners were blocked from taking the second part of the test, an oral board, based upon their race, while lower scoring blacks and Hispanics went on to take the second component, an oral board.

The City's goal was to have the following groups represented in the detective rank in the following percentages: 28.6% black, 7.9% Hispanic, and 16.4% women. (City trial ex. 45, p.4)

A total of 3392 applicants took the first component, the multiple choice test, about 2230 were white and about 1162 were black and Hispanic. The City limited the number of those applicants allowed to move on to the second component, the oral board, to 619. (R. 358, Sched.A., Stip. facts #11, #14, #17)

To determine who would take the oral board, the City imposed a quota of 17% for each of the following three groups: (1) whites and Asian Americans, (2) Hispanics and (3) blacks and American Indians.

To reach the quotas, the City required whites to have a higher cutoff score on the 94-question multiple choice test to be allowed to take the oral board. The different cutoffs were as follows:

whites, Asian Americans	82
Hispanics	78
blacks, American Indians	73

On the multiple choice list, whites and Asians were designated as "X's". American Indians and blacks were both included in the designation of "N", so there is no way to tell who was black and who was American Indian. (Joint trial ex. 1) (R. 358, Sched.A., Stip. facts # #11, 14-17, 18, 20, 23) (R. 473-3, trial tr. 362-64, 369-370, 415, 426, 440-41, 536)

If the black cutoff score of 73 were applied to all applicants, then about 1200 applicants would have moved on to the oral board, rather than 619. Due to the different cutoffs, approximately 600 white officers who scored from 73 to 81 were barred from the oral board, which was about 25% of the white applicant pool of 2230, not 5% as the court of appeals had stated. (Jt. trial ex. 1) (A-16)

The City's test developer, Patrick Conley, an industrial psychologist and former detective, testified that the 1989 detective test was job-related. (R. 358, Sched.A., Stip.

facts # 9-10, 14) (R. 473-3, trial tr.369-70, 373-74, 437-438, 493)

Conley recommended the three different race-based cutoff scores on the multiple choice component, because, he said he feared that blacks and Hispanics might sue the City for adverse impact. The 17% quotas were determined from everyone who took the test; Conley made no attempt to determine the qualified pool and did not set a minimum passing score. (R. 476-5, trial tr. 400-409, 444-448) (R. 474-3, trial tr. 362-63)

The City formulated an eligibility list, the 1990 detective list, using combined multiple choice and oral board scores, each weighted 50%. The City promoted 90 detectives from the list, imposing additional race preferences by passing over 22 whites on the list to make non-rank order promotions of blacks and Hispanics. These 22 promotions are not pertinent to this case, since the present petitioners were not allowed to take the oral board and compete for a spot on the list. The 22 white officers were eventually promoted, as a resolution of a grievance filed by the police union, for violating Article 10 of the contract, reprinted in Appendix. (A-68) The City stopped using the list after losing the union grievance. (R. 358, Sched.A., Stip. facts #18, #20, #23)

The whites who were not allowed to take the oral board due to the quotas, were not eventually promoted, as the court of appeals stated. (A-16) Since they were not allowed to finish the test they were not on the list.

The jury did not believe the City's claim that its decision to limit the number taking the oral board to about 600 was "due to space limitations at the testing facility and concerns about maintaining the secrecy of the test questions", as the court of appeals stated (A-2), as set out in this petition, p. 27. The City's witness, Patrick

Conley, had testified that the City had more space and more raters available. (R. 473-3, trial tr. 475-479)

B. Impact of race-based cutoff scores on white females

Many of the persons harmed by the race-based quotas were white females, which include many of the present petitioners. (R. 358, Sched.A., Stip. fact #1)

In 1990, there were only 23 white female detectives, out of 843 total number of detectives, as a direct result of uncontested past hiring and promotion discrimination. (City's trial ex. 45, chart on p.2) (pl. trial ex. 68, p.5)

In August of 1973 only 115 women held sworn positions within the department, which employed at that time approximately 13,500 sworn personnel. Women were segregated into separate positions as policewomen and police matrons. Before 1975 women were not entitled to compete on the patrolman's entry examination nor assigned to patrol work. (R. 474-2, trial tr. 2245, 2300-2302) (City's trial ex. 13, p.20) (City's trial ex. 45 pp.1, 2, 4)

Since the prior detective test was given in 1980, and the one before that was given in 1973, women were excluded from taking detectives' tests until 1980. The 1989 detective test, the subject of this suit, was the second detectives' test that women were allowed to take. (R. 358, Sched.A., Stip. fact #6) (R. 473-3, trial tr. 488)

The percentage of eligible females who actually took the test greatly exceeded their eligible males. The rate at which white females took the multiple choice test almost doubled the rate of white males (61.6 vs. 31.4). White females had done better than any other group on the multiple choice component. (City's trial ex. 7, pp.31, 32-37)

Out of the 3392 applicants who took the multiple choice component, 462 were white females. If the City

had used the black cutoff score of 73 for all applicants, then 220 white females would have been allowed to take the oral board, which would have been a selection rate of 47% of applicant pool for white females (220/462). When the City used the higher cutoff of 82 for whites on the multiple choice component, only 94 white females were allowed to proceed to the oral board, or 20% of their applicant pool (94/462), a reduction of almost 60%. (Joint trial ex. 1; City's trial ex. 7, pp.32-37)

C. Prior hiring preferences for minority males

In earlier litigation, the court of appeals found there was no evidence of intentional discrimination against minority males, *U.S. v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977).

Minority males took the same past hiring tests as white males. (pl.trial Ex.5, par.54)

According to the City's document, in the 1960's " . . . black applicants were being accepted in numbers far exceeding their relative proportion in the population." For the 1971 hiring test, the City engaged in increased minority recruitment. (pl.trial Ex.75, p.48)

Starting with the 1971 hiring test, the City has hired blacks and Hispanics in proportion to, or above, their percentages in the applicant pools, through direct quotas or racially altered scores. (pl.trial Exs. 64 A & B, 80) (R. 478-8, trial tr.1447-48) (R. 473-3, trial tr.531)

At the time of the 1989 detectives test at issue, the City's Affirmative Action Plan, signed by its mayor in 1989, and its operational strength report for June, 1990, showed that black males were overrepresented in the department as a whole, and particularly overrepresented in the patrol officer rank, compared to their availability in the general population. (pl.trial Ex.35, p.21 & pl.trial Ex. 68, p.6 -title 9161 police officer)

D. Prior promotion preferences for minority males

Prior to the 1989 detectives' test at issue, blacks and Hispanics took the same detectives' tests as whites, and were given promotion preferences, called "merit" appointments to detective. (pl.trial Ex.5, par.54) (pl.trial Ex.9-9g)

The City's statistical expert, Dr. Charles Mann, said that an explanation for the low percentage of minority males in the detective rank in 1989, 4.8%, was that they were going from patrolmen, a D-1 pay grade, to sergeant, a D-3 pay grade, the next rank and pay grade above detective, a D-2 pay grade. The rank of detective is not a step promotion to sergeant. A patrol officer can advance directly from the entry level to sergeant. (R. 473-11, trial tr. 1747-1749) (pl.trial Exs.36,37) (R. 358, Sched. A Stip. fact #22) (City trial ex. 45, p.2)

For the higher rank of sergeant, the City had imposed court ordered or voluntary promotion quotas beginning in the 1970's. The sergeant quotas were 40% and then 25% for blacks and Hispanics. (R. 478-8, trial tr.1457-58) (pl.trial Exs.85 & 86)

From the City's documents, Mann calculated that black males were 21% of all males in the external labor force, they were 24% of all males in the feeder pool, the police officer rank, and 24% of the next higher rank above detective, the sergeants' rank. (R. 473-11, trial tr. 1726, 1730, lines 17-18, 1742, lines 19-20, 1746, lines 4-6) He derived his figures from the City's records. (pl.trial Ex. 68, City's operational report for June of 1990, before first promotions made from the 1990 detective list) (pl.trial Ex. 35, City's affirmative action plan)

E. Management

Since the early 1980's, the CPD has been managed disproportionally by minority males, through the superintendant, commanders, chiefs, etc. Since 1983, all police

superintendants have been either black or Hispanic. From 1988 forward, black males were over 30% of management, while they were about 19% of the department as a whole. (pl.trial ex.69) (R. 358, Sched.A., Stip. fact #22)

REASONS FOR GRANTING THE WRIT

I.

On a police promotion test, the City may not set racial quotas on the first component, to give preferences to blacks, Hispanics, and American Indians, over higher-scoring white females, particularly when all females were the victims of the City's past intentional discrimination based on their sex and were severely underrepresented in the rank at issue.

By giving preferences to special groups, blacks, Hispanics and American Indians, apparently because they were political favorites, to the detriment of actual victims of past intentional discrimination, namely, women, the City disregarded this Court's proscription against awarding quotas to any "ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members", *City of Richmond v. Croson*, 448 U.S. 469, 109 S.Ct. 723 at 731 (1989).

The City admittedly manipulated the results of the 1989 detectives' test with the goal to have the following groups represented in the detective rank in the following percentages: 28.6% black, 7.9% Hispanic. Additionally, the City's admitted goal was to hold down women to 16.4%, despite the greater application rate and success rate of women. (City trial ex. 45, p.4)

To reach its percentage goals for blacks, Hispanics, and American Indians, the City set different cutoff scores by race or national origin on the multiple choice component of the 1989 detective test, so that 17% of each of the

following three groups would be be allowed to take the oral board:

whites, Asian Americans	82
Hispanics	78
blacks, American Indians	73

By using the different cutoffs, the City deprived higher-scoring females of the opportunity to take the oral board, because they were white. The jury found the applicants needed to take the oral board as well as multiple choice to determine who would be a good detective. (A-45 to 46, questions 2 & 3)

The 17% quotas for whites held down white females; the City punished their great success.

The rate at which white females took the multiple choice test almost doubled the rate of white males (61.6 vs. 31.4), and the percentage of all females who took the test greatly exceeded their male counterparts. (City trial ex.7, p.31)

White females had done better than any other group on the multiple choice component; they did better than white males, and better than male and female blacks and Hispanics. (City's trial ex. 7, pp.32-37)

Out of the 3392 applicants who took the multiple choice component, 462 were white females. If the City had used the black cutoff score of 73 for all applicants, then 220 white females would have been allowed to take the oral board, which would have been a selection rate of 47% of the applicant pool for white females (220/462). When the City used the higher cutoff of 82 for whites on the multiple choice component, only 94 white females were allowed to proceed to the oral board, or 20% of their applicant pool (94/462), a reduction of almost 60%. (Joint trial ex. 1; City's trial ex. 7, pp.32-37)

This treatment of white females compounded the City's past wrongs toward all females. Before 1975, the City had intentionally excluded all females from taking

the entrance test for patrol officers. In 1990, as a direct result of the past exclusion, females, including white females, were severely underrepresented in the detective rank. There were only 23 white female detectives, out of 843 total number of detectives. (City's trial ex. 45, chart on p.2) (pl.trial Ex.68, p.5)

The City's history of discrimination in hiring and promoting women is uncontested. In prior litigation, in which the United States sued the City for both intentional discrimination and adverse impact in hiring, promotions, assignments, and efficiencies, the court of appeals stated:

> "The unchallenged findings of the district court present a clear pattern of sexual discrimination in the Chicago Police Department. Women in the department have been traditionally segregated into separate positions as policewomen and police matrons. The number of these positions has been severly limited. In August of 1973 only 115 women held sworn positions within the department, which employed at that time approximately 13,500 sworn personnel. . . . Women were not entitled to compete on the patrolman's entry examination nor assigned to patrol work."
>
> . . . . "Not until 1975 were women first entitled to compete with men on an entry examination for patrol officer positions."

United States v. City of Chicago, 549 F.2d 415 at 434, 435 (7th Cir. 1977) (City's trial ex. 13, p.20)

In the prior litigation, the trial court found that the height requirement for entrance bore most heavily on women, not Hispanics, contrary to the court of appeals' misapprehension in this case, *United States v. City of Chicago*, 411 F. Supp. 218 at 230 (1976). (City trial ex.12) (A-8)

For the rank of detective, women were excluded from taking any detective tests until 1980. The 1989 detective

test, at issue here, was the second detective test that women were ever allowed to take. (R. 358, Sched.A., Stip. fact #6) (R. 473-3, trial tr. 488)

In its brief on appeal, the City had made the unfounded argument that it could lawfully harm white females because they are white, or "nonminority":

> " . . . Petitioners argue that the affirmative action plan adversely affected nonminorities, particularly nonminority females. . . . But of course, any affirmative action plan will reduce the rate which nonminorities are promoted as the inevitable consequence of minority promotions." (City's brief on appeal, p.38)

The court of appeals failed to even address the effect of the quotas upon the white female petitioners. The trial court did not address the issue in its final judgment; however, in its ruling denying petitioners' motion for a new trial, the trial court showed it confused the basis for the quotas, namely, race, with the inquiry into whom the quotas injured. In that ruling the trial court explained why it rejected petitioners' proposed jury question, asking the jury to determine whether there was undue trammelling on white women, saying it was a question about sex discrimination. (A-59)

Nevertheless, this case *is* about past sex discrimination, and the petitioners had pleaded the case that way. In the complaint, petitioners had set out that the City's conduct was not lawful affirmative action, since the City had cut the selection rate for white females on the 1989 detective test to 50% of their pass rate, even though historically women were the victims of past intentional discrimination, based on their sex. In the complaint, petitioners alleged that until 1975, females were not hired on an equal basis with white and minority men, and were

not allowed to take any detective test until 1980. (R. 63, pars. 48-49 & 54 j)[1]

II.

A court may not find that the City had a compelling governmental interest for the quotas, when the jury rejected the City's only attempt to show a compelling governmental interest, namely its attempt to show that unfavorable treatment or hostility caused exclusion of blacks and Hispanics from the detective rank.

Where a public employer engages in race-based preferences, it has the burden to show a strong basis in evidence that it had a compelling governmental interest for the preferences, *Croson*, 109 S.Ct. 706 at 726-730.[2] Racial quotas, would be justified in the "extreme case . . . to break down patterns of deliberate exclusion", *Croson*, 109 S.Ct. 706 at 729.

The question of whether there was past, deliberate, race-based exclusion of blacks, Hispanics and American Indians, from the detectives' rank in the CPD, was a question of fact for the jury.

Contrary to the court of appeals' statement, no question asked the jury "whether prior discrimination caused '"'the underepresentation of black and Hispanic detectives.'"' (A-14) The appeals court only put quotation marks around the latter part of the above imaginary jury finding.

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[1] The trial court had initially granted the City's motion in limine to exclude evidence concerning white women, but then let the evidence in anyway, much of it coming from the City's exhibits. (R. 345) (R. 476-5, trial tr. 400-409, 444-448).

[2] The trial court wrongly denied petitioners' motion to find the City waived the right to use race in detective promotions by entering into a contract with the police union to not use race in promotions. (A-24, 68) (R. 385).

The court gave only two, non-leading, questions on the City's claim of a compelling governmental interest. Those questions asked whether "unfavorable treatment" and "hostility" lead to the underrepesentation of black and Hispanic detectives, based on anecdotal evidence. The trial court gave no questions about American Indians. The jury responded "no" to the following two questions:

> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black police officers were subject to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies) and that this caused black police officers to be excluded from the opportunity to become detectives?
>
> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, supervisors (for example, sergeants, lieutenants, commanders etc.) in the Police Department acted in ways that were hostile to black and Hispanic police officers and that this caused black and Hispanic officers to be excluded from the opportunity to become detectives?

(A-11 to 12) (Jury questions #5.5 and #7.75)

By its responses to the above questions, the jury rejected the City's claim that its anecdotes of "unfavorable" treatment in assignments, beats, duties, or efficiencies lead to exclusion of *blacks* from the opportunity to become detectives. The jury also rejected the City's claim that asked if hostility lead to exclusion of *blacks and Hispanics* from the opportunity to become detectives.

Even if the jury had responded "yes" to the above questions, in the prior litigation, Judge Prentice Marshall had found that efficiency ratings and assignments were

not shown to be racially discriminatory, *U.S. v. City of Chicago*, 411 F. Supp. 239, 241 (1976). (A-19) (R. 331, 334). Judge Marshall did not later disagree with his own decision about the lack of intentional discrimination in assignments and efficiencies, as the trial court found without citation to any of Judge Marshall's decisions. (A-30)

Even if the jury had responded "yes" to the above questions, the above questions encompass race-neutral treatment. For example, if black officers were given menial tasks as rookies, this may be unfavorable treatment, but not racially discriminatory treatment. The City did not suggest that black and white rookies were treated differently.

In response to a question from the jury during deliberations, the trial court gave the dictionary definition of the term "hostility", defining the term for the jury to mean as little "unfriendly". (A-63) (R. 477-2, trial tr. 135-144)

In jury instruction conferences, petitioners had objected that these terms "hostility" or "intentional, unfavorable treatment" did not ask the jury to decide whether the City engaged in racially discriminatory treatment, contrary to the trial court's statements. (A-63) (R. 494, trial tr. 2717-18) (R. 430, trial tr. 2819) An inquiry into race-neutral treatment and hostility is meaningless in a reverse discrimination case. To constitute racial discrimination, conduct must be committed because of a person's race, *Oncale v. Sundowner Offshore Services, Incorporated*, 118 U.S. 998, 1002 (1998).

The jury's negative responses to the above questions were *not* contradictory to responses to three leading questions, that are set out in Point III. No other non-leading questions asking the jury whether any action lead to the exclusion of blacks and Hispanics from the detective rank.

To reconcile the above responses to it finding that there was a compelling governmental interest, the court of appeals implied the word "all" in the above questions. (A-13) This implication of the word "all" is not logical, due to the weak standard the City was required to meet. By the wording of the questions, the City was required only to "present evidence", no more than a scintilla of evidence. If the City had presented evidence that *any* blacks or Hispanics were excluded, then the jury would have answered "yes". (*Id.*)

If the court of appeals thought the jury questions should have included the word "some" or "any", to modify "blacks and Hispanics", then it should have remanded the case for a new trial with revised questions.

The anecdotal evidence should not have even been considered, since the City's decision makers did not claim to have imposed quotas based upon the anecdotes, nor that they even knew about the anecdotes. After-acquired evidence, gathered by the City's trial counsel for the purpose of the trial, should not have been considered, *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 885 (1995).

The jury's rejection of the anecdotes as the cause of underrepresentation in the detective rank, was justified by the evidence.

The anecdotes were from black witnesses only, and not from any Hispanic or American Indian witnesses. Their anecdotes were from the 1950's and 1960's, too remote in time to be relevant to detective promotions in 1990.

These witnesses did not claim they were excluded from the opportunity of promotion to detective, or higher rank. To the contrary, they all rose to the rank of detective, and many were appointed to command positions, even though they had not reached the rank of captain, as follows:

Terry Hillard: 1968 hired, 1982 sgt, 1991 lt, 1991 district commander, 1991 deputy chief, 1998 Superintendant of Police (R. 473-1 at 62, 66, 68-70) (R. 473-2 at 157)

Wayman Jones: 1961 hired, 1963 det, 1968 sgt, 1984 lt (R. 473-2 at 192, 194-96)

James Ivory: 1966 hired, 1971 det, 1980 sgt, 1984 lt (served as watch commander & district commander) (R. 473-4 at 676, 677, 696) (R. 473-5 at 759-760, 762)

Uradell Holmes: 1970 hired, 1977 sgt, 1985 lt (served as watch commander) (R. 473-6 at 986, 1024, 1025, 1029-30)

Eurel Jackson: 1954 hired, 1971 sgt (R. 473-6 at 1031-32, 1065)

Gerald Cooper: 1961 hired, 1965 det, 1969 sgt, 1985 lt, 1988 asst dep superintendent (R. 473-7 at 1085, 1086, 1091, 1217, 1218, 1229)

Wilbur Crooks: 1965 hired, 1968 det (R. 473-10 at 1550, 1553)

James Moran: 1956 hired, 1962 det, 1972 sgt (R. 473-12 at 1788, 1798, 1807)

Vance Kimber: 1973 hired, 1973 field training officer, a D-2 position, 1985 sgt (R. 473-12 at 1835, 1873)

Lorenzo Davis: 1981 hired, 1989 temp det, 1990 appt det, 1991 sgt, 1997 lt. & district commander (R. 473-12 at 1884, 1888, 1890-91)

Leroy Martin: 1955 hired, 1965 sgt, 1975 lt. (served as commander), 1981 cap. (served as deputy chief & Superintendant of Police) (R. 473-12 at 1946-1949)

The court of appeals overstated the anecdotal evidence, as follows:

A. Assignments

Overall, the black witnesses had good assignments in their long careers, including assignments to specialized

units such as gang crimes, tactical units, vice, internal affairs, mayor's bodyguards, intelligence. (trial tr., 192, 252-54, 676, 711-12, 986, 1028, 1031, 1771, 1814, 1941) Nevertheless, to support its statement that blacks had "menial jobs" (A-8), the appeals court cited three incidences remote in time, from the 1950's and 1960's, when the witnesses lacked seniority, as follows:

1) The appeals court stated: "one black officer trained to investigate traffic accidents was relegated to directing traffic. . . . " (A-8) The supporting evidence was the following:

In about 1957 or 1958, Sergeant Eurel Jackson (ret.) testified he was assigned to loop traffic at Christmastime, when he thought he should have been assigned to traffic accidents, but he was unable to say how well he scored in traffic accident school. Jackson had been hired in 1954, skipped the position of detective, and became a sergeant in 1971. (Tr. 473-6 at 1031-32, 1040-1043, 1059, 1065)

The assignment to loop traffic at Christmastime, is sought after, and today must be bid for. (R. 474-2, 2277-78) (Tr. 473-6 at 1031-32, 1040-1043)

2) The appeals court stated: " . . . another black patrol officer who was qualified for desk duty was assigned to start cars . . . " (A-8) The supporting evidence was the following:

In about 1966, Lieutenant James Ivory was hired, and as a rookie, he was directed to start cars. Ivory stated he was *not* actually permanently assigned to the desk at that time. The officers who were assigned to the desk had more seniority than Ivory. (Tr. 473-4 at 677, 688, 709) (Tr. 473-5 at 758-59).

Ivory refused to say he was directed to start cars due to his race, despite a leading question by the City. (R. 473-4 at 688).

Ivory made detective in 1971, sergeant in 1980, and lieutenant in 1984. (R. 473-4 at 677, 696) (R. 473-5 at 759-760, 762)

3) The appeals court stated: " . . . a supervisor forbade black officers from patrolling white neighborhoods or arresting white suspects." (A-8) No support in the record can be found for this statement.

In the 1950's and 1960's, the City did have a policy to assign blacks to black neighborhoods. District Court Judge Prentice Marshall found that the police department officials did not have a racially discriminatory motive for such assignments, rather they thought that they could better serve black citizens, *United States v. City of Chicago*, 411 F.Supp. at 241. Judge Marshall stated he expected this assignment policy to end, as it apparently did, as more blacks joined the department. (City's Trial Ex. 12)

B. Efficiencies

Efficiencies have not been used as part of past detective tests or for the test at issue.

The appeals court stated: "African-American officers received artificially low efficiency ratings compared to their white colleagues." (A-8)

The City called only two witnesses with complaints about efficiencies; neither claimed the efficiency was given to him because of race.

When examining them as a whole, Judge Marshall found efficiencies were not racially discriminatory, *U.S. v. City of Chicago*, 411 F.Supp. 239 (1976).

The two witnesses with complaints about efficiencies testified as follows:

1) James Ivory said that his efficiencies were always high except for one instance in about 1972. When he received the low efficiency, he was already a detective. He thought that efficiency was too low, considering that

he made a lot of arrests. (R. 473-5 at 765) On cross examination he admitted that an efficiency was based upon a number of factors other than quantity of arrests: quantity of work, quality of work, how well you relate to your peers, your report writing skills, medical role usage, attendance, promptness, and appearance. When Ivory complained, the chief of detectives raised that one efficiency, even though only Ivory's supervisor personally observed him. (R. 473-4 at 693-695) (R. 473-5 at 766)

2) Uradell Holmes stated he received low efficiencies early in his career, until he received tutoring. (R. 473-6 at 1000) Holmes was hired in 1970, skipped the rank of detective, was promoted to sergeant in 1977, and to lieutenant in 1985.

C. Hostility

The appeals court stated: To support its conclusion that there was a "climate of racial hostility and segregation", the appeals court pointed only to graffiti, stating: "The washroom walls were covered with offensive, racist, and threatening graffiti, and CPD supervisors took no action to correct the problem." (A-8) The evidence was to the contrary.

Only one officer, Wyman Jones, said he saw graffiti. He said he saw it in washrooms used by both citizens and police, in the 1970's, and the bosses ordered it removed. Jones stated:

> "the Police Department issued an order that anything of the nature would be removed immediately, and happily – I'm happy that it's being followed, that these things are not left on the washroom walls." (R. 473-2 at 232)

Jones was hired in 1961, promoted to detective in 1963, to sergeant in 1968, and to lieutenant in 1984.

III.

Where the trial court refused petitioners' proposed jury questions asking whether past discrimination led to underrepresentation of black and Hispanic detectives, the court wrongly made a finding on that issue.

The trial court refused jury questions proposed by petitioners that would have asked whether prior race-based discrimination led to the exclusion of blacks and Hispanics from the detective rank, the key issue in this case. One question is quoted in a court order. (A-58 to 59) Petitioners proposed separate questions for blacks and Hispanics.[3]

If an objection is made for failure to submit an issue to the jury, a judge has no authority to make an express finding under Rule 49(a) concerning the same issue, *Taherzadeh v. Clements*, 781 F.2d 1093, 1098 (5th Cir. 1986). A trial judge must fashion proper instructions and is not free to give one party's jury instructions or the other, *W.T. Rogers Co., Inc. v. Keene*, 778 F.2d 334, 345 (7th Cir. 1985).

Despite the fact that the trial court refused to submit the key issue to the jury, the court of appeals wrongly found that the jury's responses "yes" to all of the following three leading questions, offered by the City, meant that the jury found past discrimination led to underrepresentation:

> Did the City present evidence to support its claim that it was very unlikely that there would have been as few black and Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?

---

[3] When the instruction was offered, petitioners had offered to delete judicial language, contrary to the trial court's later statements. (R. 430, trial tr.2816) (R. 431, trial tr. 2613, 2618) (R. 433, trial tr. 2670-74) (A-39).

> Did the City present evidence to support its claim that there would have been at least 18 more black detective and 4 more Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?
>
> Did the City present evidence to support its belief that the under representation of black and Hispanic detectives was due, at least in part, to the Police Department's prior unfavorable treatment of black and Hispanic officers or persons?

(A-12)

None of the above three questions asked whether past intentional race discrimination lead to underrepresentation.[4]

The above three questions were leading and compound. The first and second contained built-in premises that blacks and Hispanics had not been hired or promoted in the same manner as whites, and the third contained the built-in premise that there was prior unfavorable treatment. Further, the second question dealt with the 22 non-rank order promotions from the final 1990 detectives' list, which has nothing to do with the present petitioners, who never got to take the oral board to get on the final list. Finally, the third question asked about belief, not about reality.

The uncontested evidence was that minority males took the same past hiring tests and detective promotion tests as white males. (pl.trial Ex.5, par.54)

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[4] Only one jury question, quoted at A-10, mentioned the term "discriminatory", although the court of appeals did not rely upon that question. That question deals with narrow tailoring, and is leading. After telling the jury in the question that there were lingering effects of prior discrimination, the jury was to determine if the different cut-scores helped to address those effects.

In the context of the trial testimony, the jury may have thought the City's belief that there was unfavorable treatment referred to the testimony of Patrick Conley, the decision-maker who recommended the race-based cutoff scores. Conley said he believed adverse impact in hiring and promotion was illegal. Conley was not a lawyer. Conley testified to his misguided belief over petitioners' objection, and against the trial court's prior ruling which barred witnesses from testifying about the law. (A-21) (trial tr. 369-70, 373-74, 400-409, 437-438, 444-448, 493, 362-63) (R. 358, sched.A., Stip. facts #9-10, 14)

The belief or state of mind of decision-makers is not a defense to a discriminatory policy. *EEOC v. Board of Governors of State Colleges*, 957 F.2d 424 (7th Cir. 1992).

Adverse impact is not illegal under Title VII. Employers are *not* faced with a "Hobson's choice", to either impose racial preferences so a minority plaintiff could not establish a statistical prima facie case, or face expensive litigation and liability, under Title VII, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 2787-2791 (1988).

As the trial court noted in an order, the City represented that it did not claim adverse impact or disparities in rank were compelling governmental interests. (A-15) The Court incorrectly ruled in the same order that evidence of adverse impact and disparities in rank were admissable as evidence of intentional discrimination. Adverse impact, by definition, is unintentional, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2050-51 (1976).

Here, the trial court made no findings to support its judgment.

For its findings, the court of appeals repeated the very anecdotes about assignments, efficiencies, and hostility, that the jury expressly rejected as the cause of black and Hispanic underrepresentation in the detective rank, as set forth in Point II of this petition. (A-8)

The court of appeals also asserted that there was extensive testimony from minority members of the CPD about discriminatory practices used to keep blacks and Hispanics from being hired and advancing within the CPD, specifically mentioning only entrance medical and physical requirements. (A-8, A-11) Again, the question of whether there were intentionally discriminatory practices, not "unfavorable treatment", should have been put to the jury.

The evidence is to the contrary.

No Hispanic and American Indian members even testified for the City.

Blacks and Hispanics have been given hiring and promotion quotas since the early 1970's, based on adverse impact, long after this Court held that only intentional discrimination would be a constitutional basis for quotas, *Watson*, 108 S.Ct. 2787-2791. Here, the court of appeals, in the prior litigation, had reversed Judge Marshall's finding of intentional racial discrimination, *U.S. v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977).

The City Deputy Personnel Commissioner Robert Joyce, and many of the City's black witnesses, testified that both blacks and whites were subjected to entrance medical and physical disqualification, for flat feet, heart murmurs, height, and weight, etc., Joyce stated that the requirements were *not* intentional discrimination.[5] (R. 473-12, trial tr. 1943, R. 478, trial tr. 2041) (R. 478-8, trial tr. 1436, 1463-64) The height requirement for entrance bore most heavily on women, not Hispanics, *U.S. v. City of Chicago*, 411 F. Supp. 218 at 230. (City trial ex.12)

The subject of hiring discrimination toward minority males is a red herring, since the low number of black

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[5] The City did not have race-identifiers for applicants before 1973, or medical records, which would have been needed to determine impact by race. (R. 478-8, trial tr. 1464-65)

detectives in 1989 simply was not the result of a shortage of that group in the feeder pool, the patrol rank. The City's own data showed that black males were overrepresented in the department as a whole, and particularly overrepresented in the patrol officer rank, compared to their availability in the general population in 1989, the time of the detective's test at issue. The overrepresentation was the result of targeted recruitment and quota hiring beginning with the 1971 hiring test. (this pet. pp. 6 to 7)

In regard to promotion practices, the court of appeals in this case did not suggest what evidence showed discriminatory practices.

The evidence was to the contrary. All of the City's anecdotal witnesses were black, and they generally liked their careers with the CPD. All were hired and promoted many times, many appointed to commander positions, and two to superintendent. Since the early 1980's, black and Hispanic males have run the CPD; all superintendents and a disproportionate number of commanders and chiefs have been black or Hispanic. (this pet. pp. 7 to 8) (pl. trial ex.69) (R. 358, Sched.A., Stip. fact #22)

For the detective rank, minority males took the same detective's tests as white males and were given promotion preferences through so-called "merit" appointments to detective. (pl.trial Ex.5, par.54 & 9-9g)

The City's statistical expert, Dr. Mann, said that the low percentage of minority males in the detective rank in 1989, 4.8%, may reflect that they were going from patrolmen directly to sergeant, skipping the rank of detective. For sergeant, the City imposed quotas beginning in the 1970's. Mann calculated that black males were 21% of all males in the external labor force, they were 24% of all males in the feeder pool for detective, the police officer rank, and 24% of the sergeants' rank. (this pet. p. 7)

IV.

Where the jury determined that the City failed to explore race-neutral alternatives, and where the uncontested facts show random inclusion of Hispanics and American Indians in the quotas and show undue trammelling on whites, the quotas were not narrowly tailored

Even where a public employer has a compelling governmental interest, it must also show a narrowly tailored plan. Underlying fact issues are questions for the jury, and a court cannot make specific findings under Rule 49(a) which overrule findings of a jury, *Quaker City Gear Works, Inc.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984).

Narrow tailoring does not mean that a public employer has one free bite, as the court of appeals misunderstood. (A-15 to 16) An employer must show it explored race-neutral alternatives, that it had a reason for the inclusion of each racial or ethnic group it included in the quotas, as set forth in subsections A-C below.

Further, the City's own documents showed that before the 1989 detectives' test, blacks and Hispanics were given preferences by means of so-called "merit" appointments to detective, that were not made according to the results of a test. (pl.trial Ex.9-9g) The City put on no evidence of how it made detectives after it ceased to use the 1990 detectives' list.

A. The jury determined that the City failed to even present evidence that it explored race-neutral alternatives

As one element of narrowly tailoring, the employer must show it explored race-neutral alternatives to increase minority participation, *Croson*, 109 S.Ct. at 728. Racial preferences must be a "last resort" option, *United*

States v. Paradise, 480 U.S. 149, 171, 107 S.Ct. 1953, 1966 (1987).

Even though adverse impact did not justify the quotas, the jury found that the City failed to present evidence to show it explored race-neutral alternatives to improve the performance of blacks and Hispanics on the multiple choice component. The jury responded "no" to the following questions:

> Did the City present evidence to support its claim that it did not have an alternative, non-race-based measure that would have been equally effective in eliminating the multiple choice section's adverse impact against black and Hispanic officers?
>
> Did the City present evidence that it explored race-neutral alternatives to improve the performance of blacks and Hispanics on the detectives test, such as setting up courses to learn the knowledge, skills, and abilities for the position, and such as giving the tests more frequently?

(R. 425, jury question #19 and question #19.5)

The trial court simply left the above jury questions and responses out of its opinion, and only acknowledged the corollary question, which asked if petitioners proved the negative. It was not petitioners' burden to prove the negative of the above questions, as the trial court found. (A-57) Proving negatives is logically impossible. The employer must show it explored race-neutral alternatives, *Croson*, 109 S.Ct. 723 at 728.

The court of appeals simply ignored the above jury questions and responses.

The City did not determine the qualified applicant pool, so that it could even gauge adverse impact. Nevertheless, the jury did not believe the facts underlying the City's claim that it could not have used the following two race-neutral alternatives to avoid adverse impact. First,

the City could have allowed all 3392 applicants who took the multiple choice component to move on to the oral board, so that each group would be selected from the multiple choice component at a rate of 100% of their applicant pools. Second, the City could have allowed the top 1200 who scored 73 and above, the black cutoff score, to move on to the oral board.

The jury found that the City failed to present evidence that its decision to limit the number of persons taking the oral board to about 600 candidates was made on a race-neutral basis. (A-45 to 46, questions 2 & 3) (R. 425) The jury answered "no" to the following question:

> Did the City present evidence that its decision to limit the number of persons taking the oral board to 619 candidates was made on a race-neutral basis?

During deliberations, this question was changed from "619" to read "about 600". (A-64) (R. 425, jury question #4.5)

By this answer, the jury rejected the claim of Conley, the test developer, that only about 600 applicants could take the oral board, because of space restrictions and a shortage of raters to administer the oral board, which were race-neutral reasons. (R. 473-3, trial tr.410-412)

On cross examination, Conley admitted that the City actually had more space and more raters available. (R. 473-3, trial tr. 475-479) Further, the City judicially admitted that, in 1987, on a sergeant's promotion test, the City had administered an oral board to over 3,400 applicants. (pl.trial Ex.56, pars.23 & 24)

It was not petitioners' burden to prove the negative of the above question, as the trial court found. (A-50) The court of appeals contradicted the above jury question and response. (A-2)

B. The uncontested facts show that the City randomly included Hispanics and American Indians in the quotas

A quota system is not narrowly tailored where a city randomly includes various racial and ethnic groups in the quotas, with no evidence of discrimination against those groups. Such random inclusion is fatal to the constitutionality of a racial preference program, whether or not a city has a compelling governmental interest for its preferences for blacks. *Croson*, 109 S.Ct. at 727-28, *Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir. 1996).

Neither the trial court nor the court of appeals addressed the issue of random inclusion.

The City included Asian Americans in the white group, and let Hispanics and American Indians move on to the oral board with a lower cutoff score than the white group, without attempting to present evidence of past intentional discrimination against those groups. (R. 358, Sched.A., Stip. facts # 14-16) (R. 473-3, trial tr. 536)

The City did not call any Hispanic or American Indian witnesses.

The court of appeals implied that only Hispanics were subjected to height and weight requirements. (slip op.7) To the contrary, the City's witness, former Deputy Commissioner Robert Joyce, stated that the height required applied to all applicants, and was not intentional discrimination. (R. 473-8 at 1464) In earlier litigation, Judge Marshall found that the height requirement bore most heavily on women, not on Hispanics, *United States v. City of Chicago*, 411 F. Supp. 218 at 230. (City trial ex.12)

C. The uncontested facts show that the City was unduly trammelling on all whites

Neither the trial court nor the court of appeals addressed the issue of unduly trammelling upon the groups injured by the quotas, namely, whites and Asian Americans, and particularly on the white female petitioners, which was the most egregious as set out in Point I of this petition.

The trial court refused petitioners' proposed jury questions regarding undue trammeling on the white group, which is an essential element of narrow tailoring, even through petitioners had proposed such questions. (A-59)

The uncontested evidence showed that the City was unduly trammelling on male whites, as well as females, since all whites had been the victims of reverse discrimination in hiring and promotion.

In earlier litigation, the court of appeals found there was no evidence of intentional discrimination against minority males, *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977). Nevertheless, beginning with the 1971 hiring test, the City continually hired blacks and Hispanics in proportion to, or above, their percentages in the applicant pools, usually through direct quotas or racially altered scores. (pl.trial Exs.64 A & B, 80) (R. 478-8, trial tr.1447-48) R. 473-3, trial tr.531)

The City did not stop with preferences at the hiring level, but imposed preferences to the same groups again and again. Throughout the 1980's, blacks and Hispanics were given preferences for detective appointments through the use of race as a factor in so-called "merit" appointments, with no claim of intentional discrimination in the detective selection process. (pl.trial Ex.9-9g)

This holding back of whites, at successive levels, was undue trammelling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

Nos. 99-1411 & 99-3639
CAROL MAJESKE, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 7262 – **George W. Lindberg**, *Judge.*

ARGUED APRIL 21, 2000 – DECIDED JULY 10, 2000

Before BAUER, KANNE, and EVANS, *Circuit Judges.*

BAUER, *Circuit Judge.* The plaintiffs in this case are 83 white police officers who work for the Chicago Police Department ("CPD") and sought, but did not receive, promotions to the position of detective. Plaintiffs sued the City of Chicago for reverse discrimination claiming that the CPD's affirmative action plan violated their rights because it resulted in the promotion of African-Americans and Hispanics instead of them. The case went to trial before a jury which made factual findings by answering 56 special interrogatories. After reviewing the jury's findings of fact, the district court entered judgment in the City's favor and found the affirmative action plan constitutional. Plaintiffs challenge this judgment, and in a

separate appeal consolidated with this one, ask us to reverse the district court's order requiring plaintiffs to pay the City's costs. We affirm the district court in both cases.

I. Background

The facts of this case date back to 1989 when the CPD administered a test to determine which Chicago police patrol officers would be promoted to the position of detective. The 1989 detective test had two components – the first was a written job knowledge multiple choice test and the second an oral examination. The CPD used the written test to whittle down the number of patrol officers that it allowed to take the oral exam. A total of 3,392 applicants took the written test, but a maximum of 650 individuals were selected to take the oral exam. This number would produce more than enough candidates to fill the expected number of vacant detective positions. The CPD also limited the number of people allowed to take the oral exam due to space limitations at the testing facility and concerns about maintaining the secrecy of the test questions.

After reviewing the results of the written exam, the CPD concluded that advancing applicants based solely on ranking in the written test would significantly reduce the number of African-American and Hispanic applicants eligible for promotion to detective. Believing that this would expose it to liability for discriminating against blacks and Hispanics, the CPD developed a plan to increase the number of minorities promoted to detective. The CPD divided all of the candidates into three groups –

white, African-American, and Hispanic. The CPD then invited the individuals that scored in the top 17% on the written test from each group to take the oral exam. This approach resulted in different cut-off scores for members of each group. The cut-off score for whites was 82, while Hispanic applicants advanced to the oral exam if they scored 79 and African-American candidates advanced if they scored a 73 or higher. Using this approach, the CPD allowed 619 applicants to take the oral examination.

On June 24, 1989, the CPD administered the oral component of the detective test to the 619 candidates and determined final scores by combining the written and oral scores and weighting the two scores equally. The Department used these final scores to create a list of applicants that the CPD determined were eligible for promotion to detective ("the eligibility list"). The eligibility list ranked the individuals based on their final composite score.

More than a year after administering the oral test and creating the eligibility list, the CPD promoted 64 officers to detective in August 1990. The top 42 people on the eligibility list were promoted to detective in rank order from the list, but the other 22 promotions were made out of rank order and were given to the 18 highest scoring African-American and 4 highest scoring Hispanic candidates. In addition to these 64 promotions, the CPD also promoted 26 patrol officers based solely on merit.

The Fraternal Order of Police ("FOP") filed grievances on behalf of patrol officers who had not been promoted, claiming that the out-of-rank and merit promotions violated the collective bargaining agreement

between the CPD and the FOP. On October 31, 1991, an arbitrator found that the out-of-rank detective promotions given to the African-American and Hispanic officers violated the collective bargaining agreement, but that the merit-based promotions did not. In response to the arbitration, the CPD made 37 additional detective promotions on March 13, 1992. The Department made these additional promotions in rank order from the eligibility list and this resulted in the top 90 candidates from that list having all been promoted to detective.

Plaintiffs filed a two-count complaint in the district court against the City of Chicago claiming that the CPD's promotion of African-Americans and Hispanics out of rank order violated their rights under the Equal Protection Clause of the Fourteenth Amendment, actionable under 42 U.S.C. § 1983. Plaintiffs also asserted a supplemental claim that the promotions violated the Chicago Municipal Code. Before trial, the City stipulated that race and national origin were factors in the promotions resulting from the 1989 detective tests, but argued that the CPD's affirmative action plan was nevertheless constitutional. Based on this admission, the parties agreed to divide the trial into three phases. Phase one of the trial was limited to the question of whether the CPD's affirmative action plan was constitutional. The plaintiffs agreed that if they lost the first phase of the trial, they would not pursue the next two phases which were to address the merit promotions and damages.

As it turned out, the plaintiffs did lose phase one of the trial. After hearing all of the evidence during a lengthy trial, a jury answered 56 special interrogatories – the overwhelming majority of which were answered in

the City's favor. Judge Lindberg reviewed the jury's answers and entered judgment for the City on plaintiffs' equal protection claim. The district court also denied plaintiffs' post-trial motions, dismissed plaintiffs' other claims pursuant to the agreement, and entered an order requiring plaintiffs to pay the City's bill of costs. Plaintiffs now appeal the judgment against them on their equal protection claim and the order that they pay the City's costs.

II. Analysis

Because this case concerns actions by a local government that were admittedly influenced by race and national origin,[1] we must apply strict scrutiny when reviewing the City's affirmative action plan. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995); *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (*en banc*). To survive strict scrutiny, a race-based classification must promote a compelling governmental interest. *See Contractors Ass'n of Eastern Pa., Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996); *Wittmer v. Peters*, 87 F.3d 916, 918-19 (7th Cir. 1996). It is well-settled law in this Circuit that a governmental agency has a compelling interest in remedying its previous discrimination and the agency may use racial preferencing to rectify that past conduct.

---

[1] Although the City's actions in this case favored African-Americans because of their race and Hispanics because of their national origin, we will use the term "race" to refer to both groups; governmental preferences based on either race or national origin are subject to the same analysis. *See Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993).

See McNamara v. City of Chicago, 138 F.3d 1219, 1221 (7th Cir. 1998); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 535 (7th Cir. 1997); *Wittmer*, 87 F.3d at 918; *Billish*, 989 F.2d at 893; *Milwaukee Cty. Pavers Assoc. v. Fiedler*, 922 F.2d 419, 421 (7th Cir. 1991). However, the government must show real evidence of past discrimination and cannot rely on conjecture. *McNamara*, 138 F.3d at 1222.

In addition to showing hard proof of a compelling interest, strict scrutiny requires the government to come forward with evidence that its affirmative action plan is narrowly tailored. *Adarand*, 515 U.S. at 235. An affirmative action plan is narrowly tailored if, as a practical matter, "it discriminates against whites as little as possible consistent with effective remediation." *McNamara*, 138 F.3d at 1222. Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994); *Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994).

Whether there is enough evidence to support a finding of a compelling governmental interest and thereby justify a race-conscious action is a question of law that we review *de novo*. *Contractors Ass'n of Eastern Pa.*, 91 F.3d at 596; *Concrete Works of Colorado*, 36 F.3d at 1522. Similarly, we apply plenary review to the issue of whether the City's affirmative action plan was narrowly tailored. *Contractors Ass'n of Eastern Pa.*, 91 F.3d at 596. Finally, since

the City prevailed at trial, we will view the facts in the light most favorable to the City and draw all reasonable inferences in its favor. *See McNamara*, 138 F.3d at 1223.

A. Compelling Governmental Interest

During trial, the City presented persuasive statistical evidence that past discrimination by the CPD in the hiring and promotion of African-American and Hispanic police officers reduced the number of black and Hispanic detectives on the police force in 1989. Rather than restate the extensive statistical data presented at trial, we will simply summarize the highlights of that evidence. Dr. Charles Mann, who qualified as an expert in statistics and the statistical analysis of employment matters, testified that he examined the CPD's racial composition, hiring, and promotion practices from 1950 through 1991. Using the total number of blacks and Hispanics in the available work force, as well as the number of blacks and Hispanics in the patrol officers' ranks at the CPD, Dr. Mann's study showed that the CPD's past hiring of African-Americans and Hispanics was substantially lower than it statistically would have been indicated. Dr. Mann testified that past promotions of African-Americans and Hispanics to detective were also substantially below what statistical analysis predicted. Dr. Mann created a statistical model to predict the expected number of African-American and Hispanic detectives there would have been in the CPD absent past discrimination. Based on this model, Dr. Mann calculated that in 1989 there should have been 221 African-American detectives, but there were only 57. Similarly, Dr. Mann testified that under his analysis there should have been approximately 43 Hispanic detectives,

but a count revealed there were only 9. Dr. Mann testified that the low number of black and Hispanic detectives was caused by the CPD's past discrimination in hiring and promotion of these two groups.

The jury also heard testimony from several minority witnesses who told of past discrimination they experienced while working for the CPD. These individuals testified about the CPD's past use of pretextual medical excuses such as flat feet and heart murmurs to disqualify African-Americans from becoming police officers. The jury learned about the CPD's past use of invalid height and weight requirements to exclude Hispanic applicants from joining the police force. In the event that the CPD did hire an African-American, those officers were assigned exclusively to African-American neighborhoods and were forbidden from patrolling white neighborhoods or arresting white suspects. African-American officers received the most menial jobs even though they were trained to perform tasks involving much higher degrees of responsibility. For example, one black officer trained to investigate traffic accidents was relegated to directing traffic and another black patrol officer who was qualified for desk duty was assigned to starting cars. African-American officers received artificially low efficiency ratings compared to their white colleagues and were frequently transferred without notice. African-American employees of the CPD also told the jury about the climate of racial hostility and segregation they endured on the job. The washroom walls were covered with offensive, racist, and threatening graffiti, and CPD supervisors took no action to correct the problem.

After hearing the statistical and anecdotal evidence of discrimination, the jury was given a special verdict form pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. The verdict form contained 56 questions, of which the jury answered "yes" to the following critical interrogatories:

> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black police officers were subject to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies)?
>
> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black and Hispanic police officers were subject to intentional, unfavorable treatment in hiring (for example, in the use of medical and entrance qualifications)?
>
> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, supervisors (for example, sergeants, lieutenants, commanders etc.) in the Police Department acted in ways that were hostile to black and Hispanic police officers?
>
> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, the Police Department tolerated acts of hostility directed towards black and Hispanic police officers?
>
> Did the City present evidence to support its claim that in 1990 the percent of black and Hispanic officers in the detective rank was significantly lower than the percent of black and Hispanic officers in the patrol officer rank?

> Did the City present evidence to support its claim that it was very unlikely that there would have been as few black and Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?
>
> Did the City present evidence to support its claim that there would have been at least 18 more black detective and 4 more Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?
>
> Did the City present evidence to support its belief that the under representation of black and Hispanic detectives was due, at least in part, to the Police Department's prior unfavorable treatment of black and Hispanic officers or persons?
>
> Did the City present evidence to support its claim that use of three different cut-scores helped to address the lingering effects of the Police Department's prior discriminatory practices by providing an opportunity for a greater number of black and Hispanic officers to compete for a spot as detective?

Along with each of these questions, the verdict form posed a question asking the jury whether the plaintiffs had proved the opposite proposition by a preponderance of the evidence. In response to each of those questions, the jury said "no."

Based on the evidence presented at trial and the jury's factual findings, we agree with the district court that there was sufficient proof of past discrimination by the City to warrant the affirmative action plan in this

case. The statistical proof revealed that past discrimination significantly lowered the number of African-Americans and Hispanics that were promoted to detective through the years. Similarly, the jury heard extensive testimony from former minority members of the CPD about the discriminatory practices the CPD used to keep blacks and Hispanics from being hired into the department; and, if a minority did manage to get a job, how they were prevented from advancing within the CPD. We have previously held that this combination of persuasive statistical data and anecdotal evidence adequately establishes a compelling governmental interest that justifies an affirmative action plan, *see McNamara*, 138 F.3d at 1223-24, and we do so again in this case.

The only credible argument plaintiffs advance to suggest that there was not enough evidence of past discrimination to warrant the affirmative action plan is based on two answers the jury gave to special interrogatories. Specifically, the jury answered "no" to the following two questions:

> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black police officers were subject to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies) and that this caused black police officers to be excluded from the opportunity to become detectives?
>
> Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, supervisors (for example, sergeants, lieutenants, commanders etc.) in the

> Police Department acted in ways that were hostile to black and Hispanic police officers and that this caused black and Hispanic officers to be excluded from the opportunity to become detectives?

According to plaintiffs, the negative responses to these two questions show that the jury rejected the City's evidence that past discrimination was the reason for the unusually low number of African-American and Hispanic detectives.

We are not persuaded by plaintiffs' argument. The most compelling reason to reject this argument is that, in other questions, the jury specifically said that past discrimination had reduced the number of African-American and Hispanic detectives at the CPD. The jury responded "yes" to the following three questions:

> Did the City present evidence to support its claim that it was very unlikely that there would have been as few black and Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?

> Did the City present evidence to support its claim that there would have been at least 18 more black detective [sic] and 4 more Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?

> Did the City present evidence to support its belief that the under representation of black and Hispanic detectives was due, at least in part, to the Police Department's prior unfavorable treatment of black and Hispanic officers or persons?

The jury's answers to these three questions are at odds with its responses to the previous two interrogatories. When a jury returns a special verdict that contains contradictory answers, "we should do what we can to save the verdict against the spectre of inconsistency." *American Cas Co. v. B. Cianciolo, Inc.*, 987 F.2d 1302, 1306 (7th Cir. 1993). Therefore, if there is a reasonable way to interpret the jury's verdict that resolves the inconsistency, the verdict must be construed in that manner. *Freeman v. Chicago Park Dist.*, 189 F.3d 613, 615 (7th Cir. 1999) (quoting *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963)).

As the district court held, the inconsistency in this verdict can be reconciled. The two questions relied on by plaintiffs asked whether the CPD's prior acts of discrimination "caused black [and Hispanic] police officers to be excluded from the opportunity to become detectives?" Because these questions asked whether discrimination "caused black [and Hispanic] police officers to be excluded" rather than whether discrimination "caused *some* black [and Hispanic] police officers to be excluded," the jury could have reasonably interpreted the questions to ask whether the CPD's prior discrimination categorically prevented all black and Hispanic police officers from ever having the opportunity to become detectives. While this is a reasonable interpretation of these questions, this notion was contradicted by undisputed evidence at trial which clearly demonstrated that some blacks and Hispanics were promoted to detective before the 1989 detective test. Accordingly, if the jury construed these two questions as asking whether the CPD completely precluded minorities from becoming detectives,

then the jury's answer of "no" is logical and supported by the evidence.

When construed in this manner, the answers to these two questions are entirely consistent with the jury's opposing responses to the later three questions. These three questions could not be construed as asking whether past discrimination completely prevented all blacks and Hispanics from ever becoming detectives. Instead, they focused on the actual and measurable impact previous discrimination had on the number of African-American and Hispanic detectives on the police force. For example, one question asked whether previous discrimination made it "very unlikely that there would have been as few black and Hispanic detectives in 1990." Another asked whether, absent the previous discrimination, "there would have been at least 18 more black detectives and 4 more Hispanic detectives in 1990." The other question posed the issue of whether prior discrimination caused "the under representation of black and Hispanic detectives." The jury responded affirmatively to each of these questions and therefore concluded that previous discrimination did reduce the number of black and Hispanic detectives at the CPD. Because the jury's responses to the special interrogatories can be reasonably viewed as consistent, we reject plaintiffs' argument.

B. Narrow Tailoring

To determine whether an affirmative action plan is narrowly tailored, the test we use is whether the racially preferenced measure is "a plausible lower-bound estimate of a shortfall in minority representation" that is

caused by past discrimination. *McNamara*, 138 F.3d at 1224. The statistical evidence credited by the jury at trial indicates that the CPD's affirmative action plan was a modest solution to a history of discrimination that caused a significant under representation of minorities in the ranks of detectives. In 1989, there were only 57 African-American and 9 Hispanic detectives at the CPD. Dr. Mann predicted that, given the appropriate labor pool and absent past discrimination, there would have been 221 black and 43 Hispanic detectives on the police force in 1989. Thus, the detective ranks at the CPD have been under represented by 164 black detectives and 34 Hispanic detectives. Considering these alarming disparities, the City's promotion of only 18 blacks and 4 Hispanics to detective easily satisfies our requirement that an affirmative action remedy reflect a reasonable low-end estimate of the number of minorities affected by past discrimination.

Aside from the stark numbers, the record contains other evidence which illustrates that the CPD's affirmative action plan was narrowly tailored. *See United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion listing factors to consider when determining whether an affirmative action plan is narrowly tailored). First, the necessity for this affirmative action was firmly rooted in both the anecdotal and statistical evidence adduced at trial. The CPD had discriminated in hiring and promotion against blacks and Hispanics in the past and failure to use out of rank promotions in 1990 would have simply perpetuated minority under representation caused by past discrimination. The CPD employed this remedial measure for only

one detective promotion and the preferences had a minimal impact on white officers. The evidence showed that using different cut-off scores on the written exam affected less than 5% of the white candidates who took the test and did not prevent any white officer from receiving a future promotion. In fact, all 22 white officers who were affected by the out-of-rank promotions were later promoted to detective and received back pay. In view of these facts and the statistical evidence, we find ample proof to sustain the district court's finding that the CPD's affirmative action plan was narrowly tailored.[2]

C. Costs

After prevailing at trial, the City filed its amended bill of costs seeking $53,302 in costs but plaintiffs contested that amount and filed a motion to review the bill of costs. The district court reduced the amount of costs by $15,149 and awarded the City a total of $38,153 for its litigation costs. Plaintiffs now challenge the district judge's order. Two of plaintiffs' arguments merit our attention.

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Taxing costs against a losing party requires two inquiries: (1) whether the cost

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[2] We have considered the other arguments raised in plaintiffs' brief but find them unworthy of discussion other than to say that we find no reversible error in the district court's rulings.

imposed on the losing party is recoverable and (2) if so, whether the amount assessed for that item was reasonable. *See Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 945 (7th Cir. 1997). "[W]e review carefully whether an expense is recoverable, but when we determine that it is, we defer to the district court, which is in the best position to determine the reasonableness of the cost." *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 852 F.2d 936, 943 (7th Cir. 1988). If there is statutory authority for taxing a specific cost, "we will not overturn a district court's decision that the cost was necessary to the litigation or its determination of what amount is reasonable absent a showing of clear abuse of discretion." *Weeks*, 126 F.3d at 945. We review an award of costs bearing in mind that there is a heavy presumption in favor of awarding costs to the prevailing party. *See M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991); *Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1988).

Plaintiffs first contend that the district court erroneously awarded the City more than $22,000 to cover the costs of obtaining daily trial transcripts and transcripts from other court proceedings. According to plaintiffs, these costs were not appropriate because the City obtained the transcripts solely "for the convenience of counsel."

A court may tax as costs the "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). We have long recognized that this includes trial transcripts and transcripts from other court proceedings necessarily obtained for use in the case. *Weeks*, 126 F.3d at

945; *SK Hand Tool Corp.*, 852 F.2d at 943-44; *State of Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 867 (7th Cir. 1981); *Wahl v. Carrier Mfg. Co., Inc.*, 511 F.2d 209, 217 (7th Cir. 1975). While the determination of necessity must be made in light of the facts known when the transcript was requested, the introduction of testimony from a transcript is not a prerequisite for finding that it was necessary. *See Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 455 (7th Cir. 1998); *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1243 (7th Cir. 1985). And, although "courts may not tax the costs of transcripts . . . provided merely for the convenience of the requesting attorney," *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993), a transcript need not be "absolutely indispensable in order to provide the basis of an award of costs." *Id.* Whether a party obtained a transcript out of convenience or necessity for use in the case is a question of fact that we will not disturb absent clear error. *Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1340 (10th Cir. 1998); *Weeks*, 126 F.3d at 945; 10 James William Moore, *Moore's Federal Practice*, § 54.103[3][e] (3d ed. 1998).

Plaintiffs claim that the district court erred in its factual determination that the City obtained the transcripts necessarily for use in the case rather than for the convenience of its lawyers. While the district court's order does not explicitly find that the City obtained transcripts for use in the case, the facts before the trial court amply support this conclusion. The City told the district court that it used the transcripts to record the court's oral rulings before and during trial, to prepare pre-trial and trial memoranda, to prepare direct examination questions

for its witnesses, to anticipate cross-examination questions, to cross-examine plaintiffs' witnesses, to draft its post-trial briefs, and to respond to plaintiffs' post trial motions. The district court must have known that the City actually used these transcripts for the case as the City attached hundreds of pages of the transcripts to memoranda filed with the district court. Because the district court was necessarily aware of facts which illustrate that the City obtained the transcripts for use in the case, we find no error in the district court's decision to award the City its costs for trial transcripts.[3]

Plaintiffs also challenge the costs levied for the City's out-of-town witnesses's hotel rooms and travel expenses. In support of this argument, plaintiffs say that the costs imposed are ones "which the statute does not allow." Contrary to plaintiffs' position, there is statutory authorization for these costs. Collectively, 28 U.S.C. §§ 1821 and 1920(3) authorize the award of costs to reimburse witnesses for their reasonable travel and lodging expenses. *Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64-65 (5th Cir. 1994); *Barber*, 7 F.3d at 645; *Chicago College of Osteopathic*

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[3] Plaintiffs also complain that the City did not need to obtain transcripts of the entire trial on a daily basis, which is more expensive than getting the transcript a few days later. This argument fails because the City established that it obtained the transcripts for use during the trial. Moreover, several courts have taxed the cost of daily transcripts where, in cases like this one, the trial was lengthy and complex. *See Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994) (*per curiam*); *Galella v. Onassis*, 487 F.2d 986, 999 (2d Cir. 1973); *A.B.C. Packard, Inc. v. General Motors Corp.*, 275 F.2d 63, 75 (9th Cir. 1960); *United States v. Davis*, 87 F. Supp.2d 82, 88 (D.R.I. 2000); *EEOC v. Sears, Roebuck and Co.*, 114 F.R.D. 615, 622 (N.D. Ill. 1987).

Med. v. George A. Fuller Co., 801 F.2d 908, 910 (7th Cir. 1986). Plaintiffs' argument on this point is therefore inaccurate. It appears that plaintiffs probably intended to assert that the costs taxed against them were unreasonable, but they lose on this point, too. The district court expressly found the costs for these witnesses to be reasonable and the plaintiffs have failed to show us any reason why that determination constitutes an abuse of discretion.[4]

III. Conclusion

The decisions of the district court in both appeals are affirmed.

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Seventh Circuit

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[4] Plaintiffs also challenge the district court's imposition of costs for photocopies, exhibits, and expenses related to the City's affirmative defenses. Having reviewed the record, we find no error in the district court's decision to tax these costs. Similarly, we are not persuaded by plaintiffs' argument that the district court applied an incorrect burden of proof because any such error was harmless.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge George W. Lindberg

Sitting Judge if Other than Assigned Judge

CASE NUMBER 89 C 7262 **DATE** 7/17/1998

CASE TITLE Majeske, et al. vs. City of Chicago

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION: Plaintiffs' amended motion in limine to bar City's witnesses from testifying about the law.

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❑ _____Ruling/Hearing on _____ set for _____ at _____.

(5) ❑ _____Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ❑ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
❑ FRCP4(m) ❑ General Rule 21
❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Plaintiffs' amended motion in limine to bar city's witnesses from testifying about the law [367] is granted in part. Defendant's witnesses shall not testify as to the law. The parties will bring to the court's attention, prior to presentation to the jury, matters on which they may be in disagreement in this regard.

/s/ George W. Lindberg

(11) ❑ [For further detail see order on the reverse side of the original minute order.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[ ] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

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United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge George W. Lindberg

Sitting Judge if Other than Assigned Judge

CASE NUMBER 89 C 7262 **DATE** 7/17/1998

CASE TITLE Majeske, et al. vs. City of Chicago

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION: Plaintiffs' find the motion to City has waived right to use race in detective promotions.

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❑ _____Ruling/Hearing on _____ set for _____ at _____.

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(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
❑ FRCP4(m) ❑ General Rule 21
❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Plaintiffs' motion to find the City has waived right to use race in detective promotions [323] is denied. The court is of the opinion that the provision of the collective bargaining agreement upon which plaintiffs rely does not constitute a waiver by defendant of the right to defend against a claim of discrimination by asserting that a race-conscious remedy was justified by some compelling governmental interest. The court is of this opinion regardless of whether the use of a race-conscious remedy would violate the collective bargaining agreement.

/s/ George W. Lindberg

(11) ❑ [For further detail see order on the reverse side of the original minute order.]

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United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge George W. Lindberg

Sitting Judge if Other than Assigned Judge

CASE NUMBER 89 C 7262 **DATE** 7/17/1998

CASE TITLE Majeske, et al. vs. City of Chicago

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION: Plaintiffs' motion in limine to bar the City from presenting adverse impact or disparities in rank as a compelling governmental interest.

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❑ _____Ruling/Hearing on _____ set for _____ at _____.

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(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
❑ FRCP4(m) ❑ General Rule 21
❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Plaintiffs' motion in limine to bar the City from presenting adverse impact or disparities in rank as a compelling governmental interest [353] is denied. Defendant has stated in open court what compelling governmental interests it intends to assert, which interests do not include "adverse impact or disparities in rank." Evidence of adverse impact or disparities in rank is admissible as relevant to issues in this case, in particular on the issue of whether there was past discrimination.

/s/ George W. Lindberg

(11) ❑ [For further detail see order (on reverse side of/attached to) the original minute order.]

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United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge George W. Lindberg

Sitting Judge if Other than Assigned Judge

CASE NUMBER 89 C 7262 **DATE** 7/17/1998

CASE TITLE Majeske, et al. vs. City of Chicago

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION: Plaintiffs' motion to find City is estopped to claim past intentional discrimination.

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

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(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
❑ FRCP4(m) ❑ General Rule 21
❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Plaintiffs' motion to find City is estopped to claim past intentional discrimination [331] is denied. Defendant did not truly prevail in the litigation in which plaintiffs contend defendant took positions inconsistent with its positions in this litigation. In addition, during the course of that litigation the law changed on the issue with respect to which the positions were taken, and subsequently the district judge in the case expressed disagreement with his own decision. Under these circumstances, the court is of the opinion defendant should not be found estopped.

/s/ George W. Lindberg

(11) ❑ [For further detail see order (on reverse side of/ attached to) the original minute order.]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Kimberly Ann Sutherland
Attorney at Law
180 West Washington Street
Suite 700
Chicago, IL 60602

Case Number: 1:89-cv-07262

Title: Majeske v. City Of Chicago

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 8/12/98 by Hon. George W. Lindberg: Plaintiffs' motion to reconsider finding of privity between the police union and the plaintiffs and finding of conflict between the contract and ordinance is denied [378-1]. The court remains of the opinion that as a matter of Illinois law there is privity between a union and its members absent a breach of the duty of fair representation. See Carver v. Nall 986 F. Supp 1134, 1140 (C D Ill 1997). The court also remains of the opinion, for the reasons stated in the ruling on plaintiffs' motion for summary judgment, that there is a conflict between the contract and the ordinance. Mailed notice

This docket entry was made by the Clerk on August 17, 1998

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute

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United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge George W. Lindberg

Sitting Judge if Other than Assigned Judge

[Illegible]

CASE NUMBER 89 C 7262 **DATE** 11/23/1998

CASE TITLE Carol Majeske, et al. vs. City of Chicago

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

DOCKET ENTRY:

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(6) ❑ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
❑ FRCP4(m) ❑ General Rule 21
❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] The court concludes plaintiffs have waived the remaining issues with respect to the merit promotions claims. Judgment on all claims in favor of defendant, City of Chicago, and against plaintiffs will be set forth on a separate document and entered in the civil docket. FRCP 58, 79(a).

(11) ■ [For further detail see order on the reverse side of the original minute order.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[ ] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[X] Docketing to mail notices.

[X] Mail AO 450 form.

[ ] Copy to judge/magistrate judge.

SLB courtroom deputy's initials

Date/time received in central Clerk's Office

Document Number number of notices

date docketed docketing deputy initials

date mailed notice mailing deputy initials

ORDER

This court has issued a memorandum and Order finding in favor of defendant and against plaintiffs on plaintiffs' claims arising from the 1989 detectives promotional examination and the 1990 promotions to detective made from the 1990 eligibility list based on that examination. Judgment was not entered at that time because plaintiffs' merit promotion claims were still pending.

In the absence of any waivers, the court would find that Phase I of the case did not resolve the issues of whether the merit promotions were made in a race-neutral fashion and whether with respect to the merit promotions the remedy utilized was narrowly tailored to the alleged compelling government interest. However, there were issues waived in this case.

The trial of this action was trifurcated on joint motion signed both by counsel for plaintiffs and and [sic] by counsel for defendant. In that joint motion it was stated:

> 3. . . . . Phase I would include all evidence necessary to determine whether the City's admitted race-conscious actions were motivated by a compelling government interest and were narrowly tailored to meet that interest.
>
> . . . .
>
> 5. . . . . The parties presently plan to introduce in phase one a variety of exhibits and witnesses whose testimony relates primarily to the merit-promotion process. Under the parties' proposal, the admission of that evidence could be deferred until a subsequent trial phase, and may be avoided altogether, depending on the outcome of Phase I.

The only race-conscious actions defendant admitted concerned the examination-based promotions. It was defendant's position that the merit promotions were made in an entirely race-neutral manner. Therefore, the parties understood that the evidence being admitted in Phase I would concern only the examination-based promotions, and that evidence concerning the merit promotions would not be admitted during that phase. The joint motion also stated:

> 4. If the City establishes that it had a compelling government interest to take race-based action, and that its actions were narrowly tailored to meet that interest, the Court would not have any need to proceed to the remaining two phases of the trial.

The court did find defendant established a compelling government interest to take race-based action, and that its actions were narrowly tailored to meet that interest. These findings were only as to the examination-based promotions as a result of the manner in which the parties agreed to separate the issues for trial. The court's conclusion is that by signing the joint motion, plaintiffs' counsel was agreeing that if defendant prevailed on the issues in Phase I, the result would control Phases II and III, even though strictly speaking the Phase I findings were not on the matters that would have been at issue in Phase III. Therefore, the court concludes plaintiff waived trial of the remaining merit promotions issues under the circumstances now presented. Accordingly, defendant is entitled to judgment on the merit promotions claims.

Judgment in favor of defendant and against plaintiffs is therefore being entered on all claims.

/s/ George W. Lindberg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAROL MAJESKE, et al. Plaintiffs, -vs- CITY OF CHICAGO, Defendant.	)	No. 89 C 7262 JUDGE GEORGE W. LINDBERG

MEMORANDUM AND ORDER

Plaintiffs, white current and former Chicago police officers, brought this action against defendant, the City of Chicago, claiming they were discriminated against in the process the Chicago Police Department used for making promotions to detective in 1990. After lengthy pretrial proceedings, 83 plaintiffs remained. The matter was divided into several phases for the purpose of trial. See FRCP 42(b). Most of the promotions were based on the results of a promotional examination, from which a list ranked in order of performance on the examination was compiled. A significant minority of the promotions, however, were so-called "merit" promotions based upon an entirely different procedure having nothing to do with the examination. The first phase of the trial concerned only the examination-based promotions. The first phase was tried before a jury, which returned a special verdict in which it made findings of fact on 56 questions put to it. These questions were on 28 issues, with the jury first being asked whether defendant had presented any evidence in support of its side of the issue and then being

asked whether plaintiffs had proved by a preponderance of the evidence their side of the issue. It is now for the court to determine, based on the jury's findings and the evidence adduced, the outcome of Phase I of the trial of this case.

The 1989 detective examination was to be conducted in two parts. The first was to be a multiple choice portion. In the second part, a limited number of those who took the multiple choice portion were to be invited to participate in an oral "work sample/assessment exercise."

The multiple choice portion of the examination was administered to 3392 candidates in April of 1989. The candidates received one point for each question answered correctly in this part of the examination, which resulted in a distribution in which applicants received scores between 33 and 94 points.

Defendant determined it would administer the oral portion of the examination to no more than 650 applicants. According to defendant, this was because defendant was going to administer the oral portion of the test to all applicants in a single day in order to preserve secrecy of the test questions. The site at which the test was to be held could only accommodate 325 applicants at a time, and the length of the oral portion of the test made it possible to test only two groups of applicants in a single day. Plaintiffs, pointing to a prior sergeants' promotional examination in which defendant administered an oral component to far more than 650 applicants, contend that this was not the true reason defendant limited the number of persons taking the oral portion of the examination to under 650.

The results of the written multiple choice portion of the examination were such that if the applicants with the top 650 multiple choice scores had been invited to take the oral portion of the examination, minority applicants would have been severely underrepresented in the oral-board pool relative to their presence in the multiple-choice pool. So, defendant divided the candidates into three groups based on their race and ethnicity – white, Hispanic, and black – and invited the applicants achieving the top 17% of scores from each group to take the oral portion of the examination. Invited to take the oral portion of the examination were white applicants achieving at least an 82, Hispanic applicants achieving at least a 78, and black applicants achieving at least a 73 on the multiple choice portion of the examination. This resulted in 619 candidates. If defendant had selected candidates strictly in rank order of their multiple choice scores, it would have used 80 as the cut-off score, since that would have resulted in 607 applicants advancing to the oral portion of the examination while a cut-off score of 79 would have resulted in 693 candidates advancing which was more than could be accommodated at the test site in a single day.

In June of 1989, the 619 candidates took the oral portion of the examination. The oral examination scores and the multiple choice examination scores were given equal weight in determining the final composite scores of the candidates. The 1990 eligibility list of officers for appointment to detective ranked the officers in numerical order in accordance with their final composite scores. When it came time to make the promotions, the candidates were promoted in the order in which they ranked

on the 1990 eligibility list with the exception of 22 officers – 18 black and 4 Hispanic officers – who were promoted out of rank order.

It is undisputed that minority patrol officers received favorable treatment, African Americans on account of their race and Hispanics on account of their ethnicity. (Since the distinction between racial and ethnic discrimination is of no moment in this case, this opinion will often use the terms "race" and "racial" to refer to both race and ethnicity.) Such treatment of white patrol officers is a denial of equal protection unless it can be justified under the standard known as "strict scrutiny." *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998). One justification that meets this standard is that the favored treatment is necessary to remedy unlawful past discrimination by the entity granting the favor. *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998). This justification requires proof that defendant engaged in racial and ethnic discrimination in the employment of police officers in the past, and also that the remedy is narrowly tailored to the violation. *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998). As a practical matter, a remedy must discriminate against whites as little as possible consistent with effective remediation for it to be narrowly tailored. *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998).

Defendant initially has the burden of production with respect to this issue. Defendant must establish that there exists a strong basis in evidence for its conclusion that remedial action was necessary. *Concrete Works of Colorado v. City and County of Denver*, 36 F3d 1513, 1521 (10th Cir 1994), citing *City of Richmond v. J.A. Croson Co.*, 488

U.S. 469, (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion). In *McNamara*, the Seventh Circuit found a combination of statistical evidence of underrepresentation of racial minorities compared to the relevant group of applicants and anecdotal evidence of discrimination sufficient to support a district court's conclusion that a defendant had satisfied this burden. See *McNamara v. City of Chicago*, 138 F3d 1219, 1223-24 (7th Cir 1998). Whether a strong basis in evidence of past discrimination exists, which would establish a compelling interest for defendant to use race-conscious measures in its promotion procedures, is a question of law. See *Concrete Works of Colorado v. City and County of Denver*, 36 F3d 1513, 1522 (10th Cir 1994). That legal conclusion, however, must be based upon factual determinations about the accuracy and validity of defendant's evidentiary support for its program. See *Concrete Works of Colorado v. City and County of Denver*, 36 F3d 1513, 1522 (10th Cir 1994).

Although defendant has the initial burden of production, the burden of proof remains with plaintiffs to establish the unconstitutionality of the affirmative action taken in the detective promotions at issue in this case. See *Concrete Works of Colorado v. City and County of Denver*, 36 F3d 1513, 1522 (10th Cir 1994). This means that if defendant presented a strong basis in evidence for its conclusion that remedial action was necessary, it then was plaintiffs' burden to establish that defendant's evidence did not constitute strong evidence of discrimination or that the remedy employed by defendant was not narrowly tailored to the violation. See *Concrete Works of Colorado v. City and County of Denver*, 36 F3d 1513, 1523

(10th Cir 1994); *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998).

In this case, a jury tried the issues of fact. Because of the way in which legal and factual issues are intertwined in the determination of whether defendant's race-conscious actions were justified by a compelling interest, a special verdict was employed to obtain the findings of fact from the jury. Under this procedure, each party waived the right to a trial by jury of any issue omitted from the special verdict unless before the jury retired the party demanded the submission of the issue to the jury. FRCP 49(a). On any issue omitted without demand, the court may make a finding. FRCP 49(a). If the court fails to make such a finding, it is deemed to have made a finding in accord with the judgment on the special verdict. FRCP 49(a).

The first question then is whether defendant established a strong basis in evidence that remedial action was necessary. In its special verdict, the jury answered each of the following questions in the affirmative:

1. Did the City present evidence to support its assertion that if it had used the same multiple choice cut-scores for all officers who took the first part of the 1989 detective examination, the results of the multiple choice section would have had an adverse impact against black and Hispanic detective candidates?

2. Did the City present evidence to support its claim that the written multiple choice section did not test for all of the qualities that make a good detective?

3. Did the City present evidence to support its claim that the written multiple choice section could not, by itself, accurately predict which candidates would perform better as detectives?

4. Did the City present evidence to support its claim that it used three different cut-scores to comply with what it believed was federal law and to avoid a lawsuit that could have been brought by the federal government or by black and Hispanic officers?

5. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black police officers were subject to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies)?

6. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black and Hispanic police officers were subject to intentional, unfavorable treatment in hiring (for example, in the use of medical and entrance qualifications)?

7. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, supervisors (for example, sergeants, lieutenants, commanders, etc.) in the Police Department acted in ways that were hostile to black and Hispanic police officers?

7.5. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, the Police Department tolerated acts of hostility directed towards black and Hispanic police officers?

8. Did the City present evidence to support its claim that in 1990 the percent of black and Hispanic officers in the detective rank was significantly lower than the percent of black and Hispanic officers in the patrol officer rank?

9. Did the City present evidence to support its claim that it was very unlikely that there would have been as few black and Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?

10. Did the City present evidence to support its claim that there would have been at least 18 more black detectives and 4 more Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?

11. Did the City present evidence to support its belief that the underrepresentation of black and Hispanic detectives was due, at least in part, to the Police Department's prior unfavorable treatment of black and Hispanic officers or persons?

18. Did the City present evidence to support its claim that use of three different cut-scores helped to address the lingering effects of the Police Department's prior discriminatory practices by providing an opportunity for a greater number of black and Hispanic officers to compete for a spot as detective?

Coupled with each of these questions, was a question asking whether plaintiffs had proved by a preponderance of the evidence the negative of the proposition, which in the case of each of these questions the jury answered no.

Therefore, the jury found that defendant presented evidence of past discrimination leading to an underrepresentation of blacks and Hispanics as detectives, and that plaintiffs did not prove any of the contrary propositions by a preponderance of the evidence.

There were two questions of potential relevance to whether defendant met its burden to which the jury answered "no:"

> 5.5. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black police officers were subject to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies) and that this caused black police officers to be excluded from the opportunity to become detectives?
>
> 7.75. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, supervisors (for example, sergeants, lieutenants, commanders, etc.) in the Police Department acted in ways that were hostile to black and Hispanic police officers and that this caused black and Hispanic officers to be excluded from the opportunity to become detectives?

These answers are not inconsistent with the other answers. It can be inferred that the jury believed that while not making it impossible, past discrimination did make it more difficult for black and Hispanic officers than it was for white officers to become detectives.

Thus the jury found defendant presented evidence of past discrimination in the hiring and promotion to detective of Chicago police officers. In addition, the jury found that while defendant did not present evidence that blacks and Hispanics were wholly excluded from the opportunity to become detectives, defendant did present evidence that blacks and Hispanics were underrepresented in the ranks of detectives and evidence that this underrepresentation was caused by prior discrimination. In addition, the jury found defendant presented evidence that the results of the multiple choice portion of the test, if used without the race-based cut-scores, would have had an adverse impact against black and Hispanic officers, that the multiple choice portion of the test did not test for all of the qualities that make a good detective, and that the multiple choice portion of the test could not by itself accurately predict which candidates would perform better as detectives. Based upon the jury's findings and the evidence underlying those findings, the court finds defendant had a strong basis in evidence for concluding past discrimination existed and race-conscious action was necessary to remedy that discrimination. Accordingly, it is plaintiffs' burden to establish that defendant's evidence did not constitute strong evidence of discrimination or that the remedy employed by defendant was not narrowly tailored to the violation. See *Concrete Works of Colorado v. City and County of Denver*, 36 F3d 1513, 1523 (10th Cir 1994); *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998).

The jury found plaintiffs failed to prove by a preponderance of the evidence any of the facts set forth in the special verdict relevant to the question of whether there

was strong evidence of discrimination. Plaintiffs accordingly have not borne their burden of establishing that defendant's evidence did not constitute strong evidence of discrimination.

Even so, plaintiffs could still prevail if they were to prove that the remedy employed by defendant was not narrowly tailored to the violation. One of the contentions raised by plaintiffs in this regard concerns the basis on which defendant decided to give the oral portion of the examination to only 619 of the candidates, selected on the basis of the race-conscious cut-scores. Defendant contends that the reasons only 619 candidates were permitted to take the oral portion of the examination were race-neutral. According to defendant, the limitation in number was because defendant wished to give the oral portion of the examination in a single day, and at a single location, which could only accommodate a maximum of 650. Plaintiffs contend it was done to favor blacks and Hispanics. The jury answered no to the question:

> 4.5. Did the City present evidence that its decision to limit the number of persons taking the oral board to 619 candidates was made on a race neutral basis?

But also answered no to the question:

> 4.5A. Did plaintiffs prove by a preponderance of the evidence that the City's decision to limit the number of persons taking the oral board to 619 candidates was not made on a race-neutral basis?

Thus, plaintiffs failed to prove that the limitation of the number of persons taking the oral portion of the examination to 619 was made on a race-conscious basis.

The identity of the 619 who went on to take the oral boards was determined by defendant's admittedly race-conscious cut-scores. The jury answered "no" to the following questions:

17A. Did plaintiffs prove by a preponderance of the evidence that use of three different cut-scores did not eliminate the multiple choice section's adverse impact against black and Hispanic officers?

19A. Did plaintiffs prove by a preponderance of the evidence that the City had an alternative, non-race-based measure that would have been equally effective in eliminating the multiple choice section's adverse impact against black and Hispanic officers?

19.5A. Did plaintiffs prove by a preponderance of the evidence that the City did not explore race-neutral alternatives to improve the performance of blacks and Hispanics on the detectives test, such as setting up courses to learn the knowledge, skills, and abilities for the position, and such as giving the tests more frequently?

In addition, after the oral portion of the examination, defendant selected out of rank order 18 black and 4 Hispanic candidates for promotion to detective on the basis of their race and ethnicity. The ultimate result then of the race-conscious measures taken by defendant was to promote 18 more black and 4 more Hispanic candidates to detective than would have been promoted otherwise. The jury answered "no" to the questions:

8A. Did plaintiffs prove by a preponderance of the evidence that in 1990 the percent of black and Hispanic officers in the detective rank was not significantly lower than the percent of black and Hispanic officers in the patrol officer rank?

9A. Did plaintiffs prove by a preponderance of the evidence that it was likely that there would have been as few black and Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the police force and promoted to detective in the same manner as whites?

10A. Did plaintiffs prove by a preponderance of the evidence that there would not have been at least 18 more black and 4 more Hispanic detectives in 1990 if blacks and Hispanics had been hired onto the force and promoted to detective in the same manner as whites?

From these findings the court concludes plaintiffs failed to prove that either the use of the cut-scores or the out-of-rank promotions were not narrowly tailored to remedy the past discrimination. The jury's findings establish that the out-of-rank order promotion of 18 black officers and 4 Hispanic officers constituted a plausible lower-bound estimate of the shortfall in minority representation among detectives that was due to the police department's intentional discrimination in the past. See *McNamara v. City of Chicago*, 138 F3d 1219, 1224 (7th Cir 1998). Therefore, the

court finds that the remedy selected by defendant discriminated as little against whites as possible consistent with effective remediation, and so was narrowly tailored to the violation. See *McNamara v. City of Chicago*, 138 F3d 1219, 1222 (7th Cir 1998).

Defendant is accordingly entitled to prevail on the basis of its affirmative defense that the race-conscious measures it undertook were necessary to remedy past discrimination. It is unnecessary to determine whether defendant would also be entitled to prevail on its other two defenses – that the race-conscious measures were justified in order to avoid a Title VII lawsuit and that those measures were justified on the basis of the operational necessity of the police department.

This result obviates the need for the contemplated Phase II regarding plaintiffs' damages. Therefore, defendant's Rule 50(a) motion concerning the standing of particular plaintiffs to participate in Phase II is moot.

ORDERED: Defendant, the City of Chicago, is entitled to judgment on plaintiffs' claims arising from the 1989 detectives promotional examination and the 1990 promotions to detective made from the 1990 eligibility list based on that examination. As plaintiffs' merit promotions claim remains pending, judgment will not be entered at this time.

Defendant's motion for judgment as a matter of law [438] is denied as moot.

ENTER.

/s/ George W. Lingberg
GEORGE W. LINDBERG
District Judge

DATED: Nov 23 1998

United States District Court
Northern District of Illinois
Eastern Division

Carol Majeske, et al.

v.

City of Chicago

JUDGMENT IN A CIVIL CASE

Case Number: 89 C 7262

❑ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

❑ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant, the City of Chicago, is entitled to judgment on plaintiffs' claims arising from the 1989 detectives promotional examination and the 1990 promotions to detective made from the 1990 eligibility list based on that examination. The court concludes plaintiffs have waived the remaining issues with respect to the merit promotions claims. Judgment is entered in favor of defendant, City of Chicago on all claims.

Michael W. Dobbins,
Clerk of Court

/s/ Sandra L. Brooks
Sandra L. Brooks,
Deputy Clerk

Date: 11/24/1998

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge George W. Lindberg

Sitting Judge if Other than Assigned Judge

CASE NUMBER 89 C 7262 **DATE** 12/9/1998

CASE TITLE Majeske, et al. vs. City of Chicago

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION: Plaintiffs' motion to file amended motion; plaintiffs' motion to reconsider and vacate judgment for defendant; plaintiffs' motion for new trial.

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❑ _____Ruling/Hearing on _____ set for _____ at _____.

(5) ❑ _____Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ❑ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
❑ FRCP4(m) ❑ General Rule 21
❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Plaintiffs' motion to file amended motion is granted without objection. Plaintiffs' motion to reconsider and vacate judgment for defendant is denied. Plaintiffs' motion for new trial is denied.

(11) ■ [For further detail see order on the reverse side of the original minute order.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[ ] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[X] Docketing to mail notices.

[ ] Mail AO 450 form.

[ ] Copy to judge/magistrate judge.

SLB courtroom deputy's initials

Date/time received in central Clerk's Office

Document Number number of notices 9

date docketed docketing deputy initials

date mailed notice DEC 11 1998

mailing deputy initials [Illegible]

ORDER

Plaintiffs have filed two post-trial motions; a motion to reconsider and vacate judgment and a motion for new trial. Based upon the prior proceedings in this action, the court's review of the motions, and the argument of the parties on the motions, the court now rules on those motions.

Plaintiffs' motion to reconsider and vacate judgment makes arguments that have previously been made to the court, or the jury, or both. Plaintiffs have made no argument in this motion or at the hearing that convinces the court that the previous rulings were incorrect. Therefore, the motion to reconsider and vacate judgment is being denied.

Plaintiffs' motion for new trial also, for the most part, makes arguments that were previously made to the court or to the jury or both. Again, plaintiffs have made no argument in the motion or at the hearing that convinces the court that the previous rulings were incorrect.

New to the motion for a new trial is plaintiffs' argument that certain issues should not have been decided by the court because plaintiffs demanded their submission to the jury before the jury retired. See FRCP 49(a). However, the issues plaintiffs now complains were not submitted to the jury were included in proposed questions containing multiple issues, included issues which were matters for decision by the court, and included an issue (sex discrimination) which the court had previously ruled was not in this case. For example, one of the questions was:

> 1. Whether, under strict judicial scrutiny, the City has shown a strong basis in evidence

that the people running the Chicago Police Department intentionally committed acts, with racial motivation, that caused *blacks* to be excluded from the opportunity to become detectives, and whether there would have been more *black* detectives in the absence of those acts in July, 1990?

If yes, then:

a) were the race-based promotions, depriving both white females and males of promotions, substantially related to the objective of remedying past discrimination?

b) were the race-based promotions a narrowly tailored remedy?

c) did the racial preferences have reasonable time limits?

d) were white females unduly trammeled upon?

e) were white males unduly trammeled upon?

f) did the City explore race-neutral alternatives to improve the performance of blacks on detectives' test [sic], such a[s] setting up courses to learn the knowledge skills and abilities for the position, and such as giving the tests more frequently?

The court continues to believe plaintiffs' proposed questions were properly refused. Since plaintiffs did not submit any proper questions on the subjects it now complains should have been submitted to the jury, the court also concludes those issues could properly be

decided by the court. The motion for a new trial will be denied.

George W. Lindberg

EXH. A

United States District Court

Northern District of Illinois

Eastern Division

Carol Majeske, et al.

JUDGMENT IN A CIVIL CASE

v.

Case Number: 89 C 7262

City of Chicago

❑ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

❑ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant, the City of Chicago, is entitled to judgment on plaintiffs' claims arising from the 1989 detectives promotional examination and the 1990 promotions to detectives made from the 1990 eligibility list based on that examination. The court concludes plaintiffs have waived the remaining issues with respect to the merit promotions claims. Judgment is entered in favor of defendant, City of Chicago on all claims.

All remaining claims are dismissed against all parties.

Michael W. Dobbins,
Clerk of Court

/s/ Sandra L. Brooks
Sandra L. Brooks,
Deputy Clerk

Date: 1/28/1999

ORAL RULINGS BY TRIAL COURT

Report of Proceedings, July 20, 1998 (R. 476-5, trial tr. 419, 436-437):

THE COURT: . . . . Next then is the City's motion to exclude evidence regarding the City code and City personnel rules. . . .

. . . . It's the court's view, in short, that the motion should be granted, because the Court finds that there was privity . . .

* * *

Report of Proceedings, August 26, 1998 (R. 477-2, trial tr. 135-144):

[ruling against plaintiffs' argument that the definition of hostility should specify racial hostility, when jury requested definition of hostility during deliberations]

THE COURT: All right. Let me just say this: It's the ruling of the Court that if you wanted that type of definition, the Court would have considered it at the time we came up with jury instructions.

I mean, the word "hostile" is used throughout these instructions. It would have been natural, if you wanted something more than the layman's understanding of the word "hostile", you could have asked for it.

Having waived that, the Court will give this particular definition. . . .

Having or showing ill will, unfriendly, antagonistic.

* * *

Report of Proceedings, August 31, 1998 (R. 477-3, trial tr. 175)

[ruling in response to jury question during deliberation regarding jury questions #4.5 and 4.5A, which asked if the City's presented evidence that its decision to limit the number of person taking the oral board to about 600 candidates was made on a race-neutral basis question]

MR. HICKS [the court's lawclerk]: . . . . "In question 4.5A can we change the wording from 'to 619 candidates' to around 600 candidates' "

THE COURT: That one is "yes"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 1, 2000

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 99-1411, 99-3639

Carol Majeske, et al.,
Plaintiffs-Appellants,

v.

City of Chicago,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 89 C 7262

George W. Lindberg, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon*, and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.

---

*Judge Ilana Diamond Rovner and Judge Ann Claire Williams took no part in the consideration of this petition.

List of Plaintiffs

Barnam, Fred
Barrett, Susan
Barrosik, James
Bringe, Nancy
Brockman, Ellwood
Broderdorf, Ray
Broderick, John
Burauer, Carolyn
Burke, Michael
Cappitelli, Phillip
Chevalier, Michael
Chudy, Eugene
Clark, Terrence
Coogan, William
Coughlin, Thomas
Craig, Robert
Danovaro, Charlotte
Duckhorn, James
Edison, David
Ewait, Gerald
Farrell, John
Ferro, Vito
Flaherty, Lenore
Francis, Richard
Gantz, James
Gatliff, Dale
Glynn, James
Glynn, Thomas
Goga, James
Graziano, Ron
Guerrieri, Victor
Haas, Michael
Hack, Anthony
Haggard, James
Harris, Michael
Hayes, John
Heimann, Scott
Hoffman, Jeffrey
Howley, Kevin
Huff, Kay
Jacobson, Maria
Jankowski, Mary Ann
Johnson, Peggy
Knysch, Lawrence
Kostecki, John
Kostecki, Steven W.
Koziol, David
Krok, Kenneth
Kuszynski, Louis
Lazzaro, Michael
Lubomski, Joseph
Maas, Neil
Majeske, Carol
Major, Robert
Matuszak, Harold
McGrath, Donald
McMahon, Richard
Medow, Brandon
Moriarty, James
O'Grady, James
O'Leary (Vondrak), Rita
Olijnyk, Bohdan
Pinkiewicz, George
Posuluszny, John
Putyrski, Leon
Richards, Edward
Rossi, Nick
Rucci, David

Sammarco, Marc
Scanlan, Patrick
Schulte, Peggy Jo
Serafini, Cynthia
Siwek, Emily
Slupski, Robert
Stachula, Thomas
Tomasik, Edward
Triner, Pamela
Vercruyse, Dale
Virgilio, Carlo
Wittenberg, Alan
Wolf (Jobe), Shirley
Wronowski, James
Ziegenhorn, Maureen

ARTICLE 10

NON-DISCRIMINATION

Section 10.1 Equal Employment Opportunity.

The Employer will continue to provide equal employment opportunity for all officers, and develop and apply equal employment practices.

Section 10.2 Non-Discrimination.

The Employer shall not discriminate against officers, and employment-related decisions will be based on qualifications and predicted performance in a given position without regard to race, color, sex, religion, age (40-63), or national origin of the officer nor shall the Employer discriminate against officers as a result of membership in the Lodge. **Nothing contained in this Agreement shall be deemed to preclude the mandatory retirement of any officer upon or after the attainment of age 63.** Officers shall not be transferred, assigned or reassigned for reasons prohibited by this Section 10.2.